

STATE OF MICHIGAN
COURT OF APPEALS

BURLINGTON INSURANCE CO,

Plaintiff-Appellee,

v

INDUSTRIAL EXCAVATING, INC, and
SOMERSET ASPHALT PAVING, INC,

Defendants-Appellants,

and

JOSEPH BRENCE and SHIRLEY BRENCE,

Defendants.

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

PER CURIAM.

In this declaratory judgment action, defendant Industrial Excavating appeals as of right from the trial court's determination that plaintiff insurance company owed neither a duty to defend nor to indemnify Industrial in a slip and fall action brought by defendants Brence. We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

The independent contractor exclusion set forth in the contract of insurance at issue can be reasonably understood in differing ways and, therefore, the exclusion is ambiguous. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991); *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). On the one hand, the exclusion can be read to exclude coverage solely for the negligent acts of the independent contractor. On the other hand, the language is broad enough to also preclude coverage for the negligent acts or omissions of the insured when those acts or omissions make it possible for the independent contractor's negligence to cause injury to a third party. For example, the contract language could be read to preclude coverage for such

* Circuit judge, sitting on the Court of Appeals by assignment.

negligent acts of the insured as hiring a careless and incompetent contractor or failing to inspect the project site.

In light of the ambiguity present in the independent contractor exclusion, the exclusion must be narrowly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996). A narrow construction of the exclusion limits its application to excluding coverage solely to the extent that the third party's injuries are caused by the negligent acts of the independent contractor. The exclusion may not be construed so broadly as to preclude coverage for the negligent acts and omissions of the insured.

In the instant case, the allegations set forth in the Brence complaint are sufficiently broad as to include claims of liability arising from the direct negligent acts of Industrial, e.g., hiring an incompetent contractor or failing to inspect the premises to ensure that the snowplowing was not performed in a negligent manner. Accordingly, the complaint set forth circumstances under which Industrial arguably would be liable for the injuries sustained by Joseph Brence and under which plaintiff would be required to provide coverage and to indemnify as set forth in the "Description of Hazards" portion of the insurance contract. Where coverage is even arguable, a duty to defend arises. *Arco Industries Corp v American Ins Co (On Remand)*, 215 Mich App 633, 636; 546 NW2d 709 (1996), lv gtd on other grounds 454 Mich 873 (1997) .

Reversed and remanded. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber